I.

STATEMENT.

This action was commenced in the Fourth District Court for Utah County, in the State of Utah, in June, 1902, by the plaintiff filing his complaint, in which he alleges that he owned eighty acres of land in Utah County, which land was barren and sterile without artificial irrigation; that with irrigation it would be productive of agricultural crops; that Fort Canyon Creek is a natural stream of water in Utah County; that the defendants owned the two quarter sections of land lying north of his land, and that they also owned a water ditch located upon and across their lands, through which they conducted water for the irrigation of their lands; that the plaintiff owned a portion of the waters of said Creek sufficient to irrigate his land; that there was no other convenient or practicable way in which to divert his water from the creek onto his land than by and through the ditch of the defendants; that to irrigate his land, it is necessary that he have a right of way through defendants' ditch.

In the 11th paragraph of his complaint plaintiff alleges, that if plaintiff is permitted by decree of this Court to use the same his land can be made productive, and the use of said waters to which plaintiff is entitled can and will be put to beneficial and public use in the irrigation of plaintiff's said land, and for no other purpose.

Upon this complaint, plaintiff asked to be permitted by the Court to enter upon defendants' land and enlarge their ditch by making it one foot wider; that he have a perpetual right of way through said ditch when so enlarged for the purpose of diverting and carrying his said water to his land for irrigation purposes; that he have his rights in and to said ditch established by condemnation, and that the defendants be enjoined from in any manner asserting any right antagonistic to such right of the plaintiff.

To this complaint the defendants interposed a general demurrer, that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendants elected to stand thereon, and the plaintiff had judgment according to the prayer of his complaint.

From the judgment of the district court, the defendants appealed to the Supreme Court of the State of Utah, which affirmed the judgment.

In the Supreme Court of the State, the defendants contended that the judgment of the trial court was in essence and effect, taking the private property of the defendants without their consent, and giving it to the plaintiff for his sole private use, and that thereby the defendants were deprived of their property without due process of law, in violation of Section One of Article XIV of Amendments to the Constitution of the United States, which provides

"Nor shall any state deprive any person of life, liberty or property without due process of law."

Notwithstanding this contention by the defendants, the Supreme Court of Utah, on January 23rd, 1904, affirmed the judgment of the trial Court.

To review this judgment of the Supreme Court of Utah, the cause has been brought here by Writ of Error.

II.

ERRORS ASSIGNED.

The Supreme Court of the State of Utah erred in affirming the judgment of the trial court, and condemning to the use of the plaintiff, and in transferring to him for his private use and benefit from the defendants, without their consent and against their objections, an interest in the defendants' ditch, and the right to enter upon the lands of the defendants and enlarge the said ditch, by making it wider than it had been constructed by them, for the reason that such transfer and condemnation of defendants' said property is for a merely private use and purpose, to-wit: the irrigation of plaintiff's eighty acres of land, and for no other purpose, and is in essence and effect a taking of the private property of the defendants without their consent for the private use of the plaintiff, and thereby deprives the defendants of their property without due process of law, in violation of Section One of Article XIV of Amendments to the Constitution of the United States, which provides "Nor shall any State deprive any person of life, liberty or property without due process of law." Which said provision of the Constitution of the

United States was expressly cited, urged and relied upon by the defendants in said Supreme Court of the State of Utah as a ground of reversal of the judgment of the trial court.

III.

ARGUMENT.

The sole question presented in this case is, was the taking of the property of the plaintiffs in error and transferring it to the defendant in error for a public use. There is no pretense either in the pleadings nor in the judgment of the Courts below, that the property condemned was to be used by any other person than the defendant in error. In paragraph 11 of his complaint, found on page 3 of the printed record, we find the following language: "That if plaintiff is permitted by decree of this Court to use the same, that his land can be made productive as aforesaid, and the use of said waters to which plaintiff is entitled can and will be put to a beneficial and public use in the irrigation of plaintiff's said land and for no other purpose." How this sole use of the property condemned by this defendant in error is converted from a private to a public use by merely calling it public, does not seem to be satisfactorily explained, and it is respectfully submitted that the nature of a use can not be changed from private to public by mere words. It has been contended in this case that irrigation is a public purpose. That *public* irrigation might lawfully be declared to be a public purpose, is not disputed; but that irrigation by a single individual for his private and sole benefit, we think never has been at all, and never can be *lawfully*

made a public use. If the irrigation of plaintiff's land under the circumstances set forth in this record be a public use, what would be a private use?

Dealing with this subject Lewis on Eminent Domain, Section 158 (1st Edition) uses the following language: "It is manifest that the legislature, in providing for the condemnation of private property, must determine in the first instance whether the use for which it is proposed to make the condemnation is a public one. But this determination is not final. All the courts, we believe, concur in holding that, whether a particular use is public or not, within the meaning of the constitution, is a question for the judiciary. Some *dicta* have been understood as announcing the doctrine that it was competent for a legislature not only to decide upon the necessity and expediency of the exercise of the power of eminent domain, but also to determine absolutely what uses are public within the meaning of the constitution. We think it more likely that these *dicta* have been misapprehended than that any judge ever intended to announce such a doctrine and the *dicta* usually referred to do not necessitate any such construction."

Taking private property for right of way for railroads is one of the commonest occurrences under the right of eminent domain, and is universally conceded to be lawful when the railroad is to become a public utility for the accommodation of all comers who offer to pay for accommodations; in other words, a public railroad. This general rule, however, would not authorize the condemnation of private property for a right of way for a railroad to be constructed and operated by one man for his sole use and benefit.

We submit that the same infirmity attaches to the claim of the plaintiff in this case.

The right of municipalities to condemn private property when necessary for supplying their inhabitants with water for irrigation or other useful purposes, is not denied. In California, under a constitutional provision therefor ,the Supreme Court has upheld the condemnation of private property for a right of way for canals to be operated by irrigation districts, which the constitution expressly declares to be public corporations.

In the case of Taylor vs. Porter, 4 Hill 140, the Supreme Court of New York went into a very full discussion of the fundamental principles involved in an attempt to condemn private property for a private way under a legislative enactment. The act was held unconstitutional and void, in an opinion which contains the following, beginning at the last paragraph of page 143: "The power of making bargains for individuals has not been delegated to any branch of the government, and if the title of A can without his fault, be transferred to B, it may as well be done without as with consideration. This view of the question is sufficient to put us upon the inquiry, where can the power be found to pass such a law as that under which the defendants attempt to justify their entry upon the plaintiff's land? It is not to be presumed that such a power exists, and those who set it up should tell where it may be found.

"Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble

magistrate in the state who transcends his jurisdiction, are utterly void. Where, then, shall we find a delegation of power to the legislature to take the property of A and give it to B,either with or without compensation. Only one clause of the constitution can be cited in support of the power, and that is the first section of the first article, where the people have declared that the legislative power of this state shall be vested in a senate and assembly. It is readily admitted that the two houses, subject only to the qualified negative power of the governor, possesses all the legislative power of the state; but the question immediately presents itself, what is that legislative power, and how far does it extend? Does it reach the life, liberty or property of a citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare? In Wilkinson vs. Leland, (2 Peters, 667), Mr. Justice Story says: 'The fundamental maxims of a free government seem to require that the rights of personal liberty and private property shall be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under a general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention.'

"He added: 'We know of no case in which a legistative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power in any state in

the Union. On the contrary ,it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced.' The security of life, liberty and property lies at the foundation of the social compact, and to say that this grant of legislative power includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration had clothed the legislature with despotic power; and such is the extent of their authority if they can take the property of A, either with or without, compensation, and give it to B. The legislative power of this state does not reach to such an unwarrantable extent. Neither life, liberty, nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power." And the entire opinion is replete with learning upon the subject.

The Court of Appeals of New York had occasion to sound a note of warning against this monstrous doctrine in the matter of E. B. W. & M. Co., 96 N. Y., 42, where the Eureka Basin Warehouse Company sought to condemn private property for the purpose of erecting its buildings and other works, under authority of a statute of the state, and held the statute unconstitutional and void. At page 48, the court expresses its views as follows: "We cannot regard such a project as a public purpose or use which justifies the delegation to the company of the right of eminent domain. The enterprise is, in substance, a private one, and the pretense that it is for a public

purpose is merely colorable and illusory. The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that the use to which the property is intended to be put, or the structure to be built thereon, will tend incidentally to benefit the public by affording additional acommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use, or to direct their management is conferred upon the public."

The last expression by the Court of Appeals of New York upon this subject, so far as I am advised is in the case of

Re Tuthill, reported in 163 N. Y., 133.

The decision in that case involved the question of the validity of an amendment to the State Constitution, when tested by that provision in the Fourteenth Amendment to the Federal Constitution, which declares that no State shall deprive any person of life, liberty, or property, without due process of law.

It was a proceeding instituted by the petitioners for the purpose of causing certain low and wet lands in the County of Orange, in the State of New York, of which they were owners, to be drained through ditches to be constructed over the lands of others; and the warrant for its commencement, and for the various steps taken, was claimed to be found in chapter 384 of the laws of 1895. The act provided in its first section, that "A person owning agricultural lands within this state may institute proceed-

ings for the drainage of such lands or the protection thereof from overflow, by the construction and maintenance of a drain or dyke, on lands of another person, or the use of mechanical devices, by presenting a verified petition to the County Court of the County," etc. The persons whose property was sought to be taken, resisted and took the matter into court. The opinion of the court is lengthy and full of learning. It holds that the drainage of agricultural lands by necessary drains, ditches and dykes, upon lands of others, under proper restrictions, and upon just compensation, for which provision may be made by general laws under the Amendment to the Constitution, Article One, Section Seven, adopted in 1894, is a taking of private property for a private use, in violation of the United States Constitution, Fourteenth Amendment, prohibiting a state from depriving any person of his property without due process of law. The note in this case, published in 49 L. R. A., 781, is full and reviews the authorities at great length.

Another case which fully reviews the elementary principles involved here is that of

Nesbitt vs. Trumbo, 39 Illinois, 110,

Where it is held that "The act of 1861, which authorizes the establishment of private ways over land, against the objections of the owners thereof, violates Article 13, Section 8, of the Constitution of the State, which provides that no person shall be disseized of his freehold or deprived of his property but by the judgment of his peers or the law of the land. The right to private property is under the protection of the Constitution, and is sacred and inviolable, and the legislature cannot take or invade it, for any mere private purpose, or transfer it from one person to another against the will of the owner,

whether indemnity be provided or not.

"Accordingly, the legislature is powerless to afford the means by which a person can procure the right of way over another person's land without his consent. His right is supreme except where the property is needed for public use, and he must be compensated before it can be taken."

In the case of

Sholl vs. German Coal Comany, 118 Ills., 427,

The Supreme Court of Illinois again took occasion to review the principles upon which public or private use is to be determined, and said, beginning at page 431: "Most of the general principles constituting the law of eminent domain are well settled. The right to take private property for public use is generally conceded to be an attribute of sovereignty, and being such, it is not within the power of the state, by legislative grant, or otherwise, to surrender or barter it away. Being inherent, it exists independently of written constitutions or statutory laws; yet, in free governments like our own, where private rights are secured by wholesome laws and constitutional restrictions, the power to take private property for the common welfare remains dormant until the terms and conditions upon which it is to be exercised have been prescribed by appropriate legislation. The power or right in question, is by some referred to the feudal theory of tenure—by others to the implied compact theory; but the better opinion, perhaps is, that it is founded upon public utility and necessity. The exercise of power is a strictly legislative function, and, subject to the right of the courts to determine whether the use for which the property proposed to be taken is a public one, and whether the condemnation proceedings have been conducted ac-

cording to law, the legislature is made the exclusive judge of the necessity or emergency justifying the exercise of the power. So far there is little or no contrariety of opinion. The chief difficulty, and the one which has led to an irreconcilable conflict, in the cases, is, to discover some satisfactory test by which a public use may, in all kinds of cases, be distinguished from private ones. Such is the difficulty here. The parties in this case are agreed, that if the use for which the property sought to be taken is a private one, there is no power or authority, under the constitution, to take it, and that, consequently, the order of the court below was without authority of law, and void. But on the other hand, if the use, under the facts disclosed, is a public one, it is clear the court below had power and jurisdiction to make the order, however many errors may have intervened in the proceedings.

"The question, then, whether the use in the present case is a private or public one, is not only directly presented, but it is of controlling influence in the event it should be determined against the petitioner, for whatever our views might be on the other questions discussed by counsel the judgment below would have to be reversed. As before stated, the decided cases furnish no universal test by which it may be described or defined, and the attempts to do so have resulted in more or less conflict.

"Without attempting to define a public use, or to give such a test, a few general observations on the subject may not be inappropriate. The expression public use, *ex vi termini*, implies an interest or right of some kind in the public, and as the public can have no existence separate and apart from the people, of which it consists, it follows, that the interest or right, whatever it is, belongs to and is

vested in the people. This being so, it is the duty of the state to see that it is properly protected. Without attempting, as we might, if the question were an original one, to determine the nature or extent of this right or interest, we have no hesitancy in saying that if the use is a continuing one, as it is in all cases where property is taken for the purposes of a public ferry, railroad or the like, the right or interest of the public is co-extensive with the use to which it is annexed, and that it is not within the power of those exercising the franchise to deprive the people of the benefits resulting therefrom. Persons or corporations condemning property for such purposes, assume certain obligations and duties to the public, which they cannot disregard, without forfeiting their franchises, and otherwise rendering themselves liable. In all such cases, the character of the business proposed to be done, and the manner of doing it, must be looked to in determining whether the use will be a public or a private one. If, from the nature of the business and the way in which it is to be conducted, it is clear no obligations will be assumed to the public, or liability incurred, other than such as pertain to all strictly private enterprises, it may safely be concluded the use is private, and not public. It is also believed to be generally, if not universally, true, that benefits resulting from a public use, capable of individual appropriation, are open to all alike, upon the same terms and conditions.

"Viewing the question before us in the light of the general principles here stated, it is clear, the use for which the land is proposed to be taken in this case is not a public one. The coal, the coal works, and the present tramway are, in the strictest sense, private property, and the public, generally, have no more interest in them or in the operation of the works, in-

cluding the tramway, than they have in any other strictly private business. The same would be equaly ly true after the proposed extension of the tramway. The extending of it to the railroad would not change its character, or the obligations of the company to the public, in the slightest degree. Without the consent of the owners of it there is not a person in the state, outside of themselves, who would have the right to ride upon it on any terms that might be proposed, or to have carried upon it a single pound of freight. Indeed nothing of the kind is contemplated or intended. It is manifest the company now has, and after such extension of its tracks would still have the right to use it for its own private business, exclusively. It could run it or cease to use it altogether, without violating any right in the public or any duty which it owes to the people. Clearly this could not be so if the use were public in the sense of the constitution."

Suppose the plaintiff in this case, having obtained by a judgment of the court, a right to enter upon the defendants' land and widen their ditch from 18 to 30 inches, so enters and widens it, and then for some reason concludes not to put any water in it. The ditch as constructed at present is just adapted to the needs of the defendants, and when made a foot wider, unless a corresponding flow of water is turned into it and kept there, will be too wide for the depth and will inevitably waste the defendants' water. Who will have any interest in the affair? Will the County, or District Attorney have any authority to move in the premises in the interest of the public and as a public measure, compel him to use this "public" utility with which the court has invested him? And yet it is the duty of one or the other of these officers to look after public interests and see

to it that they are not allowed to suffer. Would the public have any interest whatever in such a controversy? Certainly not. It would devolve upon the defendents at their own proper charges to get such relief as is given to private litigants.

Suppose again, the plaintiff, after acquiring the right to usurp the defendants' property, concludes to sell his water to some one who lives above him, and above the point where he now proposes to divert it from the creek. Has he not a right to do so? Is not the water strictly his own private property? Can any one dictate to him how he shall dispose of it? Would he not resent any interference with his rights so acquired in this ditch on the ground that the property is his, and that he can do with it as he will? And still we find him here in a court of justice asking, and so far obtaining, the right to dispose of the defendants' property after they tell him they will not sell it to him. If one man is the public, what is the meaning of private? If community of interest is necessary to public interest, where do we get the community in this case?

It has been claimed in this case that irrigation is a public enterprise, and it is if it be *public* irrigation. That same claim was made for this same kind of an attempt in the case of

Lorenz vs. Jacob, 63 Cal., 73, and the Court held that irrigation and the added interests of private mining enterprise, did not make it so, and added: "It clearly appears from the evidence that the main and substantial object of plaintiffs is to use the water in working their mining claims. That private property cannot be taken for such a purpose."

The Supreme Court of California had occasion to state some of the characteristics of public and pri-

vate use in respect to the exercises of the right of eminent domain, in the case of

Lindsay Irrigation Company vs. Mehrtens, 97 Cal., 680, where they use the folowing language: "The term 'farming neighborhood' is an indefinite expression and whether it can be applied to any particular tract of land must be determined by evidence. The word 'neighborhood' is not synonymous with territory or district, but it is a collective noun with the suggestion of proximity, and refers to the units which make up its whole, as well as the region which comprehends those units. One of the definitions given in the Century Dictionary is 'A district or locality especially when considered with relation to its inhabitants or their interests.' A farming neighborhood may be defined as a region in which there are several tracts of farming land with a proximity of location, and which can be regarded as a whole with reference to some common interests, although they are distinct in boundaries, and held in individual proprietorship. Its extent need not be characterized by fixed boundaries, nor is its existence determined by any definite number of proprietors, and while a tract of land, though large in extent, might if held in different proprietorships, constitute a neighborhood, yet it would not if held in single ownership.

"The term 'public use' is also an expression of indefinite significance, and its application to the facts of any particular case is also to be determined from evidence. The supplying of water to a tract of agricultural land, though of many thousand acres in extent, if occupied by an individual proprietor, would be for his private benefit, and not a public use, yet the same tract of land might be so sub-divided

and held in individual proprietorship as to render the supply of water to it a public instead of a private use. The same tract of land may constitute a farming neighborhood, and yet be so limited in the elements which make it a neighborhood, that the supplying of water to it would not constitute a public use. It is not necessary that the entire public shall enjoy the use, or even that it be capable thereof, but the use must be capable of enjoyment by all who may be within the neighborhood, and there must be within that neighborhood so great a number of the entire public as to destroy its character as a private use."

The case of Fallsburg Power & Manufacturing Co., vs. Alexander et al, from the Supreme Court of Virginia, reported in 61 L. R. A., 129, contains a learned discussion of this question, and holds along the same general lines as the cases above cited.

In the case of Gayland vs. Sanitary District of Chicago, 204 Illinois, 576, the Court held that the legislature cannot authorize the condemnation of private property for the erection of public mills and machinery generally, without anything to show what is meant by a public mill, or anything to give the public any interest in the mill after it is erected.

In the case of Healy Lumber Co., vs. Shamgar Morris and Wife, 63, L. R. A., 820, the Supreme Court of Washington held: "The acquisition of an easement over land for the transportation to market of logs of a private owner is within the constitutional provision that private property shall not be taken for private use, and making the question whether or not a contemplated use is private one for the determination of the courts.

"That a particular use will be of benefit to the public, does not alone make it a public use within the meaning of the constitutional provision, that

private property shall be taken only for public use.

"A constitutional authority to acquire an easement over land for a private use or necessity does not empower one land owner to condemn a right of way over his neighbor's property for the purpose of getting his logs and timbers to market." This case contains a very full discussion of the general doctrine under consideration.

The plaintiffs in error believe that the question here presented was substantially decided by this Court in the case of

The Missouri Pacific Railway Co., vs. Nebraska, 164 U. S., 403. In that case, by authority of a state statute, a number of farmers sought to compel the railway company to permit them to erect upon the railway's right of way an elevator in which to store their grain. Their contention was upheld by the Supreme Court of the State of Nebraska, but upon a review by this Court ,at page 416, the following language was used: "The order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way.

The order in question was not, and was not claimed to be, either in the opinion of the Court below, or in the argument for the defendant in error, in this Court, a taking of private property for a public use under the right of eminent domain. The petitioners were merely private individuals, voluntarily associated together for their own benefit. They do not appear to have been incorporated by the state for any public purpose whatever; or to have themselves intended to establish an elevator for the use of the public. On the contrary, their own applica-

tion to the railroad company, as recited in their complaint to the board of transportation, was only 'for a location, or a right of way at Elwood station aforesaid, for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farms and leaseholds of complainants aforesaid, as well as the products of other neighboring farms.'

"To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property, and for a public use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public.

"This Court, confining itself to what is necessary for the decision of the case before it, is unanimously of the opinion, that the order in question, so far as it required the railroad company to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of

the Fourteenth Article of Amendment to the Constitution of the United States."

It is true that in this case it has been contended in argument, and in the pleadings, and in the decisions of both courts below has been found, that the irrigation of the plaintiff's land is a public use, but we submit that such finding is erroneous, is in opposition to every adjudged sense of public use, and is a mere cheap brand to put upon a private use that it may under a false pretense pass as public; that there is no foundation in law or in common sense for saying that the use proposed to be made by the defendant in error of the property taken from the plaintiffs in error is public. We submit that it is the extreme of private use, limited, as it is, to the sole benefit of one person, who does not even propose to share his use with anybody.

The only mention of water rights in the Constitution of the State of Utah is Article 17, thereof, which says: "All existing rights to the use of any of the waters in this state for any useful or beneficial purpose are hereby recognized and affirmed."

The provisions of the statutes under which the plaintiff claims the right to maintain his action are as follows, to-wit:

Section 3588 of the Revised Statutes of Utah, 1898 provides: "Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

"5. Reservoirs, dams, water gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for supplying persons, mines and mills, smelters, or other works for the reduction of ores with water for domestic or other uses, or for irrigating purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable.

"6. Roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines; outlets, natural or otherwise, for the deposit or conduct of tailings.

"10. Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light or heat.

Section 1277 of the Revised Statutes of 1898 is as follows: "Any person or corporation shall have the right of way across and upon public, private and corporate lands, or other right of way, for the construction, maintenance, repair, and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels or other means of securing, storing, and conveying water for irrigation, or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property. Such right may be acquired in the manner provided by law for the taking of private property for public use."

Section 1278 provides: "When any person or corporation desires to convey water for irrigation, or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person or corporation, or the owner or owners of the lands through which a new canal or ditch would have to be constructed to convey the quantity of water necessary shall have the right to enlarge

said canal or ditch already constructed by compensating the owner of the canal or ditch to be enlarged, for the damage, if any, caused by said enlargement; *Provided*, That said enlargement is to be done at any time from the first day of October to the first day of March, or at any other time that may be agreed upon with the owner of said canal or ditch."

In passing upon these various provisions, the Supreme Court of Utah has construed them to mean that irrigation by one person under the circumstances appearing in the record of this case is a public use. According to that construction, a private railway, used by its owner only, the floating of logs and lumber by a single individual, the piping of water for running a single farmer's corn sheller or feed mill, used for preparing feed for his own stock only, could as consistently be declared to be a public use.

"Public" is defined in Anderson's Law Dictionary as follows: "Belonging to, concerning, of interest or importance to, affecting the people or community at large; for the accommodation or benefit of all persons."

Webster defines this term as follows: (1) Of, or pertaining to, the people; belonging to the people; relating to, or affecting, a nation, state, or community. (3) Open to common or general use; as, a *public* road; a *public* house; the *public* street."

The Standard Dictionary defines it as follows: "(1) Of, pertaining to, or affecting the people at large, or the community; distinguished from private or personal; as, the *public* welfare or safety; a *public* nuisance; *public* funds or lands; *public* acts; (2) open for the use, enjoyment, or participation of all, either free or on payment of a fee; maintained by or for the public; as, *public* streets or parks."

Anderson in his Law Dictionary defines "private" as follows: "Affecting or belonging to a single person or persons, as distinguished from the people at large; opposed to public or state."

Webster defines private as follows: "(1) Belonging to, or concerning, an individual person, company or interest; peculiar to ones self; unconnected with others; personal; one's own; not public; not general; separate; as, a man's private opinion; private property; and private purse; private expenses or interests."

The Standard Dictionary defines private as follows: (4) "Not common or general; belonging only to one or to a few individuals; special."

Measured by these definitions, it is difficult to see how the use of water by one person for his sole benefit, without any responsibility to or control by the public, can be other than a private use. No branch of the state government says to this man, you shall make use of this "public" utility, nor a word as to the manner of that use.

After spoiling the defendants' ditch, by spreading it out, by cutting away their soil and trespassing upon their premises for the purpose of so doing, for any reason sufficient to satisfy himself only, or for no reason, he may decline to put any water into the said ditch. He may dispose of the water to be taken above the point of diversion, without in any manner becoming responsible to the state or any subdivision thereof, and even without being liable to account to the defendants for the destruction of their property beyond the bare pittance he is ordered to pay for entrance into their ditch and upon their lands in the first instance, even though the defendants may be irreparably injured by the destruction of their ditch for the purposes for which they made

it. It is a matter of no public concern, a matter in which the public has no interest, but is a mere *private* injury which the plaintiff might well justify by pleading the judgment of the court in this case. In addition to dispoiling the defendants of their property and giving to the plaintiff a perpetual right to tresspass upon their land, it fastens upon them as well a joint interest with a stranger, no matter how objectionable personally he may be to them. Instead of taking their property from them and compensating them for it, as is ordinarily done in cases of condemnation under the right of eminent domain, there is but a tenancy in common conferred upon the plaintiff, an unwilling partnership forced upon the defendants, which we submit in all candor is without authority of law and without the sanction of any principle of reason.

The Constitution of the State of Utah, Article One, Section 22, reads as follows: "Private property shall not be taken or damaged for public use without just compensation."

We think it is conceded throughout this case, that this constitutional provision means that private property cannot be taken against the will of the owner for a private use under any circumstances. So that the only question to be determined is, is the use for which this condemnation is allowed a public use within the meaning of the Fourteenth Amendment to the Constitution of the United States. In support of our contention that it is not a public use, in addition to the authorities already cited, we respectfully invite the Court's attention to the following decisions:

Bankhead vs. Brown, 25 Iowa, 540.
Matter of Albany Street, 11 Wendell, 151.

Concord Railroad Co., vs. Greeley, 17 New Hampshire, 47, 55.

Bloodgood vs. Mohawk & Hudson River Ry. Co., 18 Wendell, 9.

Beekman vs. Railway Co., 3 Paige, 73.

Witham vs. Osborn, 4 Oregon, 318.

Helburn's Case, 3 Bland (Md.) 95.

Hoy vs. Swan's Lessee, 5 Md., 237, 244.

Dunn vs. Charleston, Harper (S. C.) 189.

Osborn vs. Hart, 24 Wis., 89.

Tyler vs. Beacher, 44 Vt., 648.

Dickey vs. Tennison, 27 Mo., 373.

Clark vs. White, 2 Swan, 540.

Sadley vs. Langham, 34 Ala., 311.

Valley City Salt Co., vs. Brown, 7 W. Va., 191.

New Central Coal Co., vs. George's Creek Coal & Iron Co., 37 Md., 537.

Varner vs. Martin, 21 W. Va., 534.

Bangor Railroad Co., vs. McComb, 60 Me., 290.

McChandless' Appeal, 70 Pa. St., 210.

Embury vs. Connor, 3, N. Y., 511.

Scudder vs. Trenton Deleware Falls Co., 1 N. J. Eq., 694, 726.

Robinson vs. Swope, 12 Bush (Ky.) 21, 27.

Harding vs. Funk, 8, Kansas, 315, 323.

Jenal vs. Green Island Draining Co., 12 Neb., 163.

Waddell's Appeal, 84 Pa. St., 90.

Brown vs. Beatty, 34 Miss., 227, 240.

Hand Gold Mining Co., vs. Parket, 59 Ga., 419, 421.

McQuilton vs. Hallon, 42 Ohio St., 202.

Upon these authorities we respectfully submit that the Judgment of the Supreme Court of Utah is in violation of the rights of the plaintiffs in error as guaranteed by the Fourteenth Amendment, and is therefore erroneous and ought to be reversed.

J. M. Whitecotton

Attorney for Plaintiffs in Error.